IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of decision: 18/03/96

CRIMINAL APPEAL No 954 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE K.J.VAIDYA
and
Hon'ble MR.JUSTICE M.H.KADRI

STATE OF GUJARAT
Versus
RAJENDRASINH RAMJANSIH & ORS.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Mr.J.A.Shelat, APP, for Petitioner.

CORAM : MR.JUSTICE K.J.VAIDYA and
MR.JUSTICE M.H.KADRI
(18.3.1996.)

ORAL JUDGMENT (per VAIDYA, J.)

We have been simply stunned to find quite queer and totally indiscreet attitude of the learned Additional City Sessions Judge, Ahmedabad, in acquitting four accused persons on the most questionable ground, viz. that the prosecution failed to examine the witnesses!! It is simply unfortunate and disgusting too, that on the one hand the learned trial Judge did not care to realise his own duty to do justice, as if he had none, and on the other hand, placing the entire blame on the prosecution side, as if that was just and sufficient ground to white-wash the accusation of serious offence levelled against the accused, more particularly in a serious case wherein sword has been used, and the accused has been arraigned for the offence punishable under section 307 of the I.P.Code !! It is indeed a settled legal position to be ignorant about by any experienced Judge that once the charge is framed, the ball is unquestionably in the court of the trial Court and the learned trial Judge has, indeed no alternative but to decide the case on merits one way or the other depending upon the quality of evidence produced before him. If the Investigating Agency was found to be careless, remiss in not assisting in keeping the witnesses present before it, the Court ought not have felt that utterly helpless in exercising its powers, by seeing that the witnesses were made to be kept present by adopting coercive method. Merely because apparently the learned trial Judge was annoyed and frustrated with the prosecuting agency in not keeping the witnesses present before the court for examination on the date so fixed for hearing, that wrath, anger and displeasure could not have been given vent to the greatest deteriment and prejudice of the cause of justice!! To do so is not only indiscreet, illegal but with respect, we may further add and assert that it is gross judicial misconduct also. If the prosecuting agency did not keep witnesses present before the court, what wrong, fault was indeed committed by the injured, aggrieved citizen who had knocked the door of the Court for justice ? In fact this is a case wherein we believe that if the prosecution failed to discharge its duty in keeping the witneses present before the court, likewise the trial court has also unpardonably miserably failed in discharge of its duty in not issuing bailable, failing which even non-bailable warrants to the recalcitrant witnesses and concerned Investigating Officer to secure their presence before the Court and give evidence. Here in the instant case, in fact it appears that the ld.APP had asked for some time that was not granted by the trial

Court. In our view, if the summons were served and it was brought to the notice of the Investigating Officer, and still, if the witnesses did not remain present, nothing prevented the learned trial Judge from issuing non-bailable warrants against the concerned witnesses, including the Police Officer. When the prosecution for whatever reasons does not keep the witnesses present before the court and at this juncture, if the court also, depending upon the mercy of the process serving agency surrenders its duty and will to do justice to the recalcitrant witness and/or to the inefficient investigating agency, then, in that case, we are afraid, in good many cases, the court will have to record the order of acquittals !! Under such circumstances, what is the difference between the Courts doing justice and the recalcitrant witnesses and inefficient process serving agency, hostile to the cause of justice ? To sit passive with the folded hands! Such unjust and illegal acquittals because of spineless attitude of the Judge is always nothing but a judicial suicide. We totally disapprove and condemn such negative attitude which has brought about the total failure of justice. If the criminal justice system is gradually failing, shaking the faith of people in it, it is entirely because of the unconcerned judicial attitude, with no sense of accountability to the cause of justice! This simply can't be done and never done and yet we find that the learned trial Judge has done it.!! In fact on this point of elementary duty of the court and procedure to be followed when witnesses are not present or produced before the court, there are plethora of judgments from this court itself, and had indeed the learned trial Judge and for that purpose even the ld.PP tried little even to go through the digest of cases, they could have surely found out a correct procedure and acted upon the same. To cite some such reported decisions, they are (1) STATE OF GUJARAT vs. LALIT MOHAN, 1989(2) G.L.R., 952; (2) STATE OF GUJARAT vs. RAMANBHAI R. PANDYA, 1993(1) G.L.R., 881; (3) STATE OF GUJARAT vs. Dr.C.K.PATEL, 1991(2) G.L.R., 995; (4) STATE OF GUJARAT vs. KIRIT MAGANBHAI PATEL, 1993(1) G.L.R., 674; (5) STATE OF GUJARAT vs. LOHANA PRAKASH DAYALJI & ANR., 1994(1) G.L.R., 112, (6) STATE OF GUJARAT vs. SHAMBHUBHAI JIVRAMBHAI PATEL, 1995(1) G.L.R., 803; (7) B.J.PANDYA, OCTROI INSPECTOR, GODHRA MUNICIPALITY vs. ARVINDKUMAR KANUBHAI HADIAL & ORS., 1995(2) G.L.R.,1100; and (8) STATE OF GUJARAT vs. BHUPATBHAI MULJHIBHAI & ANR. 1995(1) GUJARAT CURRENT DECISIONS, 786 (Guj). In this last mentioned case, in para 6, it is held as under:

" Now having heard the learned advocates for the respective sides quite at length, it clearly appears to this Court that the impugned order is per-se perverse and illegal. The learned Magistrate was not conducting a "mock trial"!! The case he was trying was a serious case under the Prohibition Act wherein 400 tins of molasis valuing at Rs.l,90,002/were seized. This is a serious offence against the Society as from such molasis (rotten Gur) only the country liquor is prepared, which in the past has resulted into several hooch tragedies taking heavy toll of human lives and making many more surviving blind for life. To view such an offence lightly and too technically and in follow through machanically acquit the accused is something quite unbecoming of any learned Magistrate, which cannot be countenanced for a while even. Once the court takes cognizance of any case, it is its first and foremost duty to do justice and while doing the same, it can take assistance of the prosecution.Accordingly, if the prosecution renders desired assistance, well and good, but in case if for whatever reasons it fails to render the same, it is for the court to exert and assert its judicial powers to compel the witnesses to remain present before the court at any cost and see that the cause of justice do not suffer and fail on account of the negligent prosecution. Turning to the facts of the present case it is apparent that the complainant was a Police Officer. Under the circumstances, it was the duty of the court to see that in the first instance by issuing summons and thereafter, warrant and even if that was not heeded to, by issuing even non-bailable warrant, he was kept present before the Court and examined in the overall interest of public. Not to discharge this duty in the manner suggested above, at the cost of repetition, it may once again be emphatically reiterated, stated that it is serious dereliction of duty, which neither can be countenanced lightly by the Administration of Justice nor can the learned Magistrate expect Society to pardon him. It further appears that the learned APP has also not taken the desired care in conducting the trial and it was for this reason only that he was summoned by this Court to remain present. On appearing before this court Mr. Vasant Rana from the file pointed out that the trial Court had once prepared summons against the complainant Police Officer but for whatever reasons that remained on the file and was never taken out to be served upon the complainant. Now this circumstance

on the contrary is an indicator to show that the learned APP Mr.Vasant Rana had not taken any further interest in the matter, though his explanation was that because he was over-burdened with the work, he could not discharge his duty to the desired extent.As stated above, merely because the learned APP for whatever reasons failed to evince the desired interest in keeping the complainant present before the Court, this was certainly no ground for the learned Magistrate to throw to winds his sense of duty, interest and initiative in the matter of examining the complainant as has been done in the instant case. If the learned Magistrate was of the opinion that despite the fact that the to panch witnesses were present in the court and the learned APP was not present to examine them either he should have waited for the learned APP to come or should have adjourned the case to some future date and in case if the learned Magistrate was of the opinion that the learned APP was in habit in not regularly attending the court, then he should have drawn the attention of the concerned DSP and the learned District Magistrate of the area. Be the case as it may, but the fact remains that such short-circuit premature acquittal in a serious case like the present one ought not to have been gifted away on the flimsy excuse of prosecution not examining the complainant where it was also plainly the duty of the learned Magistrate to take necessary steps to examine him in order to subserve the ends of justice. These glaring infirmities in the conduct of trial positively make out the case of remanding the case to the trial court for denovo trial. It is not possible for this court to agree with the submission made by Mr. Dave that since all the panchas have already failed to support the prosecution, therefore, the solitary interested evidence of Police Officer standing by itself would not be of any consequential assistance to the prosecution and that the remanding of the case would be an idle formality and waste of public time. There are cases and cases where depending upon the overall credibility of the evidence of the concerned Police Officer that the same can as well be relied upon despite the fact that the panchas had chosen not to support the prosecution. It is indeed too premature at this stage to say that the evidence of concerned Police Officer would inspire the confidence of the trial court or not. That all depends upon the honesty, integrity, performance and capacity of the concerned Police Officer to

withstand the cross-examination at trial. "

Similarly, in the case of STATE OF GUJARAT vs. YOGENDRAKUMAR BHASKERRAO SETALVAD & ORS, in para 8.1 of the judgment in Criminal Appeals No. 66 to 71 of l985, rendered on 13.4.1993, this Court held as under :

"8.1 The above chart submitted by the learned APP speaks volume as to how, why and under what circumstances, the trial got protracted for five long years, and from that it cannot be said that respondents also have not contributed in delaying the cases, and accordingly were in way less guilty for the said delay ! It is quite true that the prosecution has failed to examine the witnesses, but then incidentally it may also be stated that this is not a new phenomenon altogether as it has come to the notice of this court since quite sometime that number of such cases are just thrown-off mid-stream by the courts without any effective trial, on the stock ground of either (i) the cases have become old, or (ii) the complainant was absent when the cases were called out, or (iii) despite sufficient time given, the prosecution failed to examine the witnesses, etc. etc. Now none of the aforesaid grounds more particularly when the charges are framed can be said to be legal grounds for acquitting the accused as the court has equally, rather more serious and important duty of doing the justice. These days, by and large, we do find number of criminal cases go on failing due to the non-prosecution which is clearly attributable either to the inefficient or corrupt practices adopted by the process serving agency or the Investigating Officer or the learned PP incharge of the cases, and therefore, to that extent the said three can be said to be guilty for the said non-prosecution. This undoubtedly is the matter of very serious concern for anyone, which the State Government will have to consider in all seriousness to control and regulate the same by taking some effective, stringent departmental actions against the erring agencies. But under no circumstances, the non-prosecution of the cases on the part of prosecuting agency can be permitted to write-off on the one hand the serious charge against the accused and on the other hand to deny the aggrieved citizens their fundamental right under the Constitution to have justice from the Court. After framing of the charge, if for

whatsoever reasons, the prosecution is found to be either accused or guilty of non-prosecution then in that case, the situation is such wherein before the trial court, there are two groups of accused - one the original accused who is charged under the relevant Section of the particular Act, and the second one is the prosecuting agency for misconducting itself in not discharging duty and letting off the accused by non-prosecution ! Thus merely because the prosecution stands accused or guilty of non-prosecution, the trial court is not justified in acquitting the accused. As a matter of fact, if the prosecution is found to be prima-facie guilty of non-prosecution, then it is an unquestionable duty of every Court to report the remissness on the part of the said agency at once to the concerned higher-ups, and thereafter, should also further issue warrants or even non-bailable warrants to the concerned witnesses to secure their presence for examination purposes. Now instead of discharging this positive duty towards the cause of justice, if the trial court opts for easier and negative way of acquitting the accused then that is nothing but a serious dereliction of duty on its part which is by no means less serious than the dereliction of duty on the part of prosecution in not prosecuting the accused. In short, once the charge is framed, the accused cannot be acquitted on the sole ground either of non-prosecution by the prosecution or non-trial by the Court. It may further be stated that the trial court cannot be permitted to be oblivious to the important fact that the prosecuting agency is merely an agency to voice and ventilate the grievances of aggrieved citizen before the court and thereafter to do everything needul to assist the Court in rendering the justice. Under the circumstances, if for whatever reasons the prosecuting agency commits some default and does not examine the witnesses and as a result if the accused are to be acquitted that would be in substance denying justice to the aggrieved citizen who on the one hand has no locus standi to directly approach the Court to conduct the trial and on the other hand, the prosecution fails him to get the justice ! Under such embarrassing and quite paradoxical circumstances where the aggrieved citizen has to go? Is he to break his head against the wall for not getting justice anywhere ? This aspect is required to be clearly understood by all concerned, i.e. prosecuting agencies as well as trial courts. One can understand the mistake committed by the Court

> either in appreciating the evidence or interpreting some provisions of the law, but there is no defence left open to any Court or for that purpose to any prosecuting agency even to commit any error on the simple, elementary, first principles of the procedure as to how to conduct the trial ! It is hoped that what is observed here percolates deep down, both - on the trial court as well as prosecuting agency and henceforth will stop themselves from foisting injustice on the aggrieved citizen. "

It is indeed quite unfortunate that despite the fact that on the point involved, there are number of reported judgments cited above, not even one of them appears to have been noticed by the learned trial Judge to be properly guided in the matter. This is indeed very sad and sorry state of affairs !! How indeed for the fault of prosecution you can shut the doors of justice to the injured, aggrieved citizen for no fault of him and more particularly when he has no right to engage advocate of his own choice to prosecute and try his case ? The learned trial judge was under moral and legal obligation to understand this !! Such mistakes on elementary point in a given case could be treated as tantamount to contempt of court even by a Judge. This according to us is a serious lapse on the part of the learned trial Judge and accordingly we hereby warn that if any such lapse is committed in future, by any judicial officer who is expected to ensure that justice is done, shall be viewed extremely seriously, and accordingly shall be kept in confidential file of erring officer. Rather, we following the stand taken by the Supreme Court in the case of Re: M.P Trivedi & Ors., reported in 1996 (1) JT p-495 also feel that the judicial officers (who are not inclined to be update with the latest decisions of the High Court and Apex Court on basic, elementary principles of law) should be made aware from time to time of the law laid down by this Court and the Apex Court of the country, more particularly in connection with such vital procedural point as involved in the instant case, and for that purpose for junior members of the judiciary short refresher course may be conducted at regular interval by the judicial academy of the State so that judicial officers are made aware about the development of law over and above by sending copies of judgement to all. Anyway,

turning and having regard to the facts and circumstances of the case, we once again reiterate that if the witnesses do not remain present at the trial, the trial Court is duty-bound in the first instance to issue bailable and failing this, even non-bailable warrants for securing their presence before the court. In case thereafter even if the Investigating Agency is found to be not co-operating with the court, then in that case, the learned trial Judge in the first instance, has a duty to summon, failing which, even issue non-bailable warrant, against the concerned Investigating Officer also calling upon him to show cause as to why witnesses were not kept present, what efforts he made to secure their presence, etc. etc. and to file appropriate affidavit describing the way in which he discharged his duty in tracing out and securing the presence of witnesses before the court. And in case if the court after reading the affidavit of the Investigating Officer still feels that he or his subordinate process serving agency has committed willful default in complying with court's directions to serve summons or execute the warrant, (as the case may be), then, notice of contempt of court can and ought to be invariably issued against such erring Investigating Officers or process serving agencies. Similarly, in the second instance, it is also the duty of the court to bring to the notice D.S.P. or Commissioner of Police (as the case may be) with a copy to of the Director General of Police bringing to their notice the inaction and remisness of the concerned Police Officer in not keeping the witnesses present before the Court which these Officers are directed to keep in the Confidential service record file of the concerned Police Officers. It is quite true that if accused are on bail and they are unnecessarily subjected to inconveniences and hardships because witnesses were not kept present, the court would certainly be not powerless to impose cost, even exemplary cost on the State and in given case to be paid by the concerned Police Officer from his pocket. If indeed the court is inclined to do justice and nothing less then but justice, it has indeed all powers under the Criminal Procedure Code to effectively assert and impose, regulate and control the proceedings before it. Only thing required is sense and will to do justice, real justice at any cost, meaning thereby, judicial activism. Believe it or not but, in absence of sincerity, honesty of purpose, and public accountability, will to do justice can never dawn upon any Judge.

2. Anyway, in the present case, since the case is not decided on merits, but stands disposed of merely because the witnesses were not examined by the

prosecution, on such default acquittal we do not deem it necessary at all to issue notice to the Respondents, and accordingly, the appeal is required to be straight-away allowed and remanded to the trial court, for further trial according to law. Indiscreet orders such as the present one vest no right whatsoever in the accused to be heard before patently illegal and perverse order is quashed and set aside.

3. In the result, this appeal is partly allowed. The impugned judgment and order passed by the learned Addl. City Sessions Judge, Ahmedabad, in Sessions Case No. 66 of l992 dated 3.7.1995 is hereby quashed and set aside, and the case is remanded to the trial court with a direction to dispose of the same on merits according to law in light of the observations made above. Principal Judge, City Sessions Court is directed to entrust this matter to any learned Judge other than the one who passed the impugned order from which this appeal arises. In case, if the Investigating Officer once again fails to discharge his duty in securing the presence of witnesse, the trial court is directed to take steps in light of the observations made hereinabove.

3.1 The Registry is directed to forward a copy of this judgment to (l) Director, Judicial Academy, Gujarat State, Ahmedabad; and (2) the Public Prosecutor, in charge of the case, for necessary information and immediate effective action.

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